

# **EXHIBIT O**

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF HAWAII

3  
4 WAYNE BERRY, a Hawaii CIVIL NO. CV03-00385 SOM LEK  
citizen, (Copyright)

5 Plaintiff,

6 vs.

7 HAWAIIAN EXPRESS SERVICE,  
8 INC., a California corporation, VOLUME II  
et al.,

9 Defendants.

10

11 VIDEOTAPED

12 DEPOSITION OF WAYNE BERRY

13

14 Taken on behalf of Defendants,  
15 at the Law Offices of Kobayashi, Sugita & Goda,  
16 Suite 2600, 999 Bishop Street, Honolulu, Hawaii,  
17 commencing at 1:11 p.m.,  
18 on Thursday, May 19, 2005, pursuant to Notice.

19

20 BEFORE: HEDY COLEMAN, CSR #116, RPR, CRR, CM  
21 Notary Public, State of Hawaii  
Certified Shorthand Reporter

22

23  
24 Ali'i Court Reporting  
25 2355 Ala Wai Boulevard, Suite 306  
Honolulu, Hawaii 96815

1 APPEARANCES:

2 For the Plaintiff:

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TIMOTHY J. HOGAN, ESQ.  
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For the Defendant Post-Confirmation Trust:

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ANNE E. LOPEZ, ESQ.  
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and

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For the Defendants Hawaiian Express Service, Inc.,  
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1 For the Defendant Guidance Software, Inc. and Michael

2 Gurzi:

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8 For Defendant Alix Partners, LLC:

9 GREGORY Y.P. TOM, ESQ.  
10 Watanabe Ing Kawashima & Komeiji  
11 999 Bishop Street  
12 23rd Floor  
13 Honolulu, Hawaii 96813

14 Also present: Wayne Berry

15 Martin Walker, Ph.D.

16 Videographer: Robert Whitman

1 products.

2 Q Did you discuss anything else with the Department  
3 of Agriculture, other than the concern about diversions?

4 A No.

5 Q How long ago did you have that communication?

6 A Whenever we had that mad cow was in the news.

7 Q Now, yesterday you mentioned that you have a  
8 concern in connection with milk cartons that have Fleming's  
9 name on them, and that you had done some investigation  
10 relating to that. Do you remember?

11 A Yes.

12 Q Have you contacted the Department of Agriculture  
13 or any other entity in connection with the milk labeling  
14 that you brought up yesterday?

15 A The Department of Health in Honolulu.

16 Q Okay. So there is a state agency that you have  
17 communicated with regarding Fleming, or I guess this would  
18 be C&S?

19 A I don't -- I think Fleming -- yeah, you're  
20 probably right. The only time Fleming's name was mentioned  
21 was the name on the carton. It was more regarding the --  
22 the bad milk, and the fact that the shelf life is no good  
23 and it all comes over here in one large container. And  
24 we're probably the only state where we have double  
25 pasteurized milk.

1 Q Okay. So did the Department of Agriculture to  
2 your knowledge find any wrongdoing by Fleming or C&S in  
3 connection with diversions?

4 MR. HOGAN: Objection; vague as to just -- just  
5 Department of Agriculture?

6 MR. SMITH: Correct.

7 A They don't report back to me. I have no  
8 knowledge.

9 BY MR. SMITH:

10 Q Okay. And did the State of Hawaii Department of  
11 Health have any -- come to any conclusions that anybody had  
12 acted improperly in connection with the milk cartons that  
13 you found with Fleming's name on them? I apologize.

14 Did the Department of Health come to any  
15 conclusion that any wrongdoing had been engaged in  
16 with respect to the milk cartons that you had found?

17 A They don't report back to me, either. I have no  
18 knowledge.

19 Q You have no knowledge of that. Now, you -- your  
20 investigation of those milk cartons, you must have bought  
21 some of the milk, is that right?

22 A From time to time, yes.

23 Q And then you scanned the package, the label on the  
24 carton in order to get an image of it?

25 A I think at one point Mr. Capozzola, didn't you get

1 a copy of the milk?

2 Q That's why I'm asking. So is that what happened,  
3 you scanned the milk carton?

4 A I don't know if I personally did it, but, yes, the  
5 milk carton was scanned and sent.

6 Q If you didn't, who did that, Mr. Hogan or Mr.  
7 Hogan's office?

8 A It may have been, yes.

9 Q Okay. And then you named the file Moo, or was  
10 that Mr. Hogan's office?

11 A I think that was a communication between Mr. Hogan  
12 and Mr. Capozzola. I don't -- I don't e-mail Mr. Capozzola  
13 directly.

14 Q So the file wasn't named Moo until Mr. Hogan sent  
15 it to Mr. Capozzola, is that it?

16 A I don't know that. I may have named it. I don't  
17 know who named it.

18 Q Okay. Now, we've remembered the State of Hawaii  
19 Department of Health and another entity that you've  
20 communicate with. Are there any other state agencies that  
21 you've communicated with regarding Fleming or its officers  
22 or employees?

23 A That's all I can remember.

24 Q Okay. How about C&S Hawaii, have you communicated  
25 with -- other than State Department of Health, have you

1 C E R T I F I C A T E  
2

3 I, HEDY COLEMAN, CSR, in and for  
the State of Hawaii, do hereby certify:

4 That I was acting as shorthand  
5 reporter in the foregoing matter on the 19th day of  
May, 2005;

6 That the proceedings were taken  
7 down in machine shorthand by me and were thereafter  
8 reduced to typewriting by me; that the foregoing  
represents, to the best of my ability, a correct  
transcript of the proceedings had in the foregoing  
matter;

10  
11 I further certify that I am not  
12 counsel for any of the parties hereto, nor in any  
way interested in the outcome of the cause named in  
the caption.

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19 DATED: May 23, 2005  
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23 Hedy Coleman  
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HEDY COLEMAN, CSR #116  
Notary Public, State of Hawaii  
My commission expires: 9-14-05